DOCUMENT RESUME

ED 165 181 CS 204 668

AUTHOR Middleton, Kent R.
TITLE A Case Against First Amendment Protections for Commercial Advertising.
PUB DATE Aug 77
NOTE 49p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (60th, Madison, Wisconsin, August 21-24, 1977)

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS *Business Communication; Censorship; Civil Liberties; Constitutional History; *Constitutional Law; Consumer Protection; *Court Litigation; *Freedom of Speech; *Information Dissemination; Mass Media
IDENTIFIERS *Advertising

ABSTRACT

Although extending constitutional protection to commercial expression might benefit the consumer, the First Amendment is the wrong instrument for carrying out what are basically economic policies. While in most First Amendment cases the nature of the content determines whether it is constitutionally protected, advertising is distinct in that it draws its meaning or identification from the product or service it promotes. The eighteenth century offers little proof that the framers of the Bill of Rights would have excluded commercial advertising, since commerce and expression were not distinct concepts at that time. However, the free trade of ideas for the effective functioning of a democracy, which is emphasized in the First Amendment, is not the same as the free trade involved in commerce. Protecting advertising weakens the First Amendment in that it requires more administrative regulation, and the protection of false ideas (intended for democratic debate on important issues) is misleading for the consumer. If the courts wish to deal with advertising as a constitutional issue, they can rule that bans on advertising violate the Fifth and Fourteenth Amendments by depriving persons of liberty or property. (MAI)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED165181

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

A Case Against First Amendment Protections For Commercial Advertising

By

Kent R. Middleton

University of Texas

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Kent R. Middleton

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

CS204668

A Case Against
First Amendment Protections
For Commercial Advertising

By

Kent R. Middleton

University of Texas

Introduction

Felix Frankfurter once observed that the Supreme Court is sometimes so preoccupied with the constitutionality of legislation that it forgets to consider the wisdom of the legislation.[1] Frankfurter was not saying that constitutionality should be determined only by the justices' opinion of what was wise social policy, but he wanted to remind his readers that constitutionality is not synonymous with propriety.

Since 1975 the court has used the Constitution three times to strike down state regulations prohibiting advertising. In the first case, Bigelow v. Virginia, the court invalidated legislation banning advertisements of abortion referral services.[2] In 1976 the court,in Virginia State Board of Pharmacy v. Virginia

Citizens Consumer Council, struck down another Virginia law banning advertising of the prices of prescription drugs.[3] A year later the court declared unconstitutional state bar regulations prohibiting lawyers from advertising fees. (Bates v. State Bar of Arizona)[4]

In these three cases the court extends constitutional protections to commercial expression traditionally regulated by the state. Messages which had been denied constitutional consideration under the court's "commercial speech doctrine" are now protected by the first amendment.[5] In each case the Supreme Court held that the advertising restrictions violated citizens' first amendment right to receive commercial information.

The court has not said that all true commercial advertising comes under the first amendment, but the court suggested it might be willing to extend first amendment protections to a wide variety of commercial speech. "[T]he notion of unprotected 'commercial speech' all but passed from the scene," Mr. Justice Blackmun wrote for the court in Virginia Citizens, citing the Bigelow decision of the year before.[6] Since 1951, Blackmun noted, the court had ". . . never denied protection on the ground that the speech in issue was 'commercial speech.'"[7] Mr. Justice Rehnquist, who dissented in all three of the court's recent commercial speech cases, feared that the door had been opened to protecting all kinds of commercial speech, including ads for liquor, cigarettes and other products the use of which Rehnquist thinks the state has a legitimate interest to discourage.[8]

Supporting Rehnquist's contention is the care Blackmun took in

Virginia Citizens and Bates to emphasize the commercial nature of the advertisements for prescription drugs and lawyers' services. First, the court was granting first amendment protection to prices, the element of an advertisement that is at once most commercial and least editorial or ideational.[9] The court was not giving protections to ads which touted the professional skills of the pharmacist or lawyer.

Secondly, Blackmun noted that the pharmacists' economic motives did not weaken the constitutional claims of their advertising.[10] Thirdly, Blackmun argued that the pharmacist is largely a commercial retailer selling pre-packaged products and that the lawyer offers many routine services that can be uniformly priced and advertised.[11] Where the court justifies constitutional protections on the mundane, routine and uniform nature of the products and services advertised, there would seem to be no logical barrier, as Rehnquist said, to extending the first amendment to ads for other commercial products. If the public has a right to information about drug prices and lawyers' fees, why does it not also have a right to information about the prices of washing machines, gasoline and liquor?

This paper will argue that the Supreme Court may have initiated a policy that will benefit consumers, but that the first amendment is the wrong instrument for carrying out what is essentially an economic policy. Consumers may have a need for more information about commercial products and services, but this need is not a constitutional, or at least a first amendment, issue. The court is again too preoccupied with constitutionality.

As Walter Gellhorn said of the court's recent decisions on commercial speech, "[T]he first amendment is being overworked."[12]

This paper will argue (1) that advertising which offers a product or service for sale is not expression meriting first amendment protections, but instead is an agent of property transactions in the economic marketplace;[13] (2) that as part of trade and commerce commercial advertising does not serve purposes for which the first amendment was designed; (3) that using the first amendment inappropriately to decide commercial questions will weaken constitutional protections on more important political and social expression; and (4) that consumerism can be advanced in other ways that will not violate first amendment freedoms.

Advertising and Property

Although many legal scholars support constitutional protections for commercial advertising,[14] at least two highly respected first amendment theorists have opposed the idea. Thomas I. Emerson excluded commercial advertising from his theory of protected expression because it belongs to ". . . a separate sector of social activity involving the system of property rights rather than free expression."[15] Alexander Meiklejohn said, "The constitutional status of a merchant advertising his wares is utterly different from that of a citizen who is planning for the general welfare."[16] Where advertising was not necessary for democratic decision-making, Meiklejohn did not think it worthy of first amendment status.[17]

Advertising does indeed belong to the system of property rights rather than the system of expression. Advertising belongs to the economic marketplace which is a forum for exchanging property. As James Carey pointed out, advertising is a means of expressing property interests in the marketplace.[18]

Courts, legislatures and publishers have recognized advertising as an economic force of a different nature than protected editorial content in the media. Not until the recent commercial speech decisions has product advertising been considered anything other than ". . . an instrumentality of commerce."[19] A state supreme court and a federal agency have ruled that advertising shoppers are not newspapers, but are business enterprises not entitled to exemptions accorded publications with editorial content.[20] Where courts have recognized a right to advertise, it has not been a first amendment right of a company to express itself but rather a property right concomitant with the right to do business.[21] The Federal Trade Commission began regulating advertising--with the sanction of the Supreme Court--[22] because of the contributions of advertising to ". . . unfair methods of competition in commerce."[23]

Advertising, unlike most editorial content, has raw economic clout. Advertising can perpetuate monopoly power, promote unfair quantity discounts and contribute to other anticompetitive practices.[24] Where newspapers have been charged in antitrust suits--suits concerned with excessive economic power--the reason has often been illegal commercial advertising practices.[25]

Newspaper publishers have long recognized that advertising

belongs to the business side of the enterprise, not to the editorial side. Almost all news organizations separate their news and advertising departments. The New York Times put the two departments on separate floors with great deliberateness.[26]

Commercial advertising is different from editorial content because it draws its meaning and identification from a product or service it promotes. Advertising is like a label that cannot be detatched from the property it attempts to sell. In fact, many courts equate advertising with labeling, especially in cases of food and drugs such as Virginia Citizens.[27]

Because advertising has an integral relationship with the product it represents, a test of constitutionality does not depend on the content of the advertisement. In Virginia Citizens and Bates, Mr. Justice Blackmun said that if expression is to lose constitutional protections it must be for its content.[28] In most first amendment cases the nature of the content will in fact determine whether it is constitutionally protected. A newspaper article, for example, has value for the content of its sentences alone. If the article is found to libel, to invade privacy, to provoke a fight, to threaten security, or to be obscene, it loses its first amendment protection because of its content.[29] The words themselves damage a person's reputation or offend his sensitivities. The content of the expression determines whether first amendment protections are lost.

Although Blackmun said content would determine whether commercial advertising is constitutionally protected, he contradicted this by saying advertising would lose its protections if it promoted an illegal product.[30] Thus constitutionality of

an advertisement could depend not on content but on the legality of some external product with which the ad is associated. If a drug is declared illegal, then an ad for the drug, even if true, could be denied protections.[31] A person might buy advertising space to protest the ban, but he could be barred from advertising the specific drug. Commercial restrictions on the product, justifiable as protections for the consumer, extend to the advertising which is integral to the product. No first amendment rights are infringed because the content has no expressive value independent of the product.

Even a false advertisement, which can also be prohibited according to the court's rulings,[32] inflicts damage not so much through its content as through the marketplace. Unlike a libelous statement whose content injures reputation directly, a false advertisement causes no damage until the consumer spends money for a product. His injury is economic or physical, once removed from the content of the false advertisement.[33]

As Mr. Justice Blackmun says, if speech is to lose first amendment protections, it should be for its content. But the content test can be applied only where the content of the speech has value or inflicts damage in its own right. Expression in the political, social, even sexual, spheres are thus appropriate for a content test. But commercial advertising, whether true or false, is not speech so much as it is a surrogate for property. Its legality, value and meaning depend not so much on its content as on the product it tries to sell. It is therefore appropriate that

regulations applying to commercial property transactions also apply to advertising.

If constitutional protection depends on the legality of property with which it is associated, it becomes an easy matter to bypass constitutional protections altogether. In the Pentagon Papers case, Mr. Chief Justice Burger viewed the secret history of the Vietnam War as so much stolen property:

> To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought--perhaps naively--was to report forthwith, to responsible public officers.[34]

A California court ruled that receiving a stolen list of undercover narcotics agents violated penal code prohibitions against receiving stolen property. The court considered the list to be property, in part, because of the value of the paper on which the list was printed and because the Los Angeles Free Press paid to acquire it.[35]

The Supreme Court did not agree with Chief Justice Burger's point of view. Rather than look at the Pentagon Papers as merely stolen property, the court ruled the government had not met the heavy burden of justifying prior restraints. Several justices agreed that if important political expression is to lose its constitutional privilege, it will be because the content of the documents presents an immediate danger of irreparable damage to the nation, not because of any property interest residing in the

documents themselves.[36]

It may be appropriate to punish a reporter for breaking and entering to steal documents, but the publication of important secrets relating to public issues should be protected from prior restraint and subsequent punishment if, as several justices said in the Pentagon Papers case, no irreparable damage to the welfare of the nation can be demonstrated.[37] One must look to the danger inherent in the content to be published, not to any property value in the documents.

Unlike the Pentagon Papers and other political and social statements, the content of commercial advertisements has no independent value. It is therefore appropriate to treat them as extensions of the property they attempt to sell in the marketplace. Where neither the property being offered nor the hoped-for commercial transaction has any special constitutional status, there is no justification for giving constitutional protection to the words which serve as an instrument for the proposed sale. Where the government has a legitimate interest in regulating products and services to protect the consumer, it also has a legitimate interest in regulating advertising for those products and services.

First Amendment Purposes

Even though commercial advertising belongs to trade and commerce rather than to "speech," it of course has elements of expression. But if expression is to be constitutionally protected, it must be more than a group of words that convey meaning; it must be expression that serves purposes the first amendment was designed to protect.

To determine the purposes of the first amendment one can first examine the intensions of the authors of the Bill of Rights, keeping in mind that what may have been true 200 years ago is not binding on modern courts or legislatures.[38] Judge Jerome Frank, in an appellate court opinion in Valentine v. Chrestensen, categorically denied that the founding fathers meant to include commercial speech under the first amendment. "Such men as Thomas Paine, John Milton and Thomas Jefferson," Frank said, "were not fighting for the right to peddle commercial advertising."[39] But the historical record does not support Frank's unequivocal statement. The role of commercialsim in the eighteenth century as well as intellectual and legal currents of the time offer little conclusive evidence that the founding fathers would have necessarily excluded commercial advertising from first amendment protections. More persuasive evidence that the first amendment was never intended to protect commercial speech is the relentless repetition by judges, philosophers and politicians since the eighteenth century of the idea that free expression must be protected for political--not commercial--reasons.

The founding fathers were conspicuously reticent about what the first amendment was supposed to mean.[40] No American leader is known to have argued specifically for including commercial advertising under the first amendment,[41] but isolated statements and common ideas of the period provide evidence that advertising might not have been categorically excluded from first amendment protections. "A free press," Richard Henry Lee said in his demand for a Bill of Rights, "is the channel of communication to

mercantile and public affairs. . . ."[42] The not-uncommon belief in the eighteenth century that speech should be free ". . . as far as . . . it . . . does not hurt or control the Right of Another. . ." also leaves room for advertising in a theory of protected expression.[43]

Other evidence is found in the extensive use of advertising in the eighteenth century. The 1700s were a time of growing commercialism when advertising was of unquestioned value in announcing the arrival of a new shipload of useful products.[44] After a long wait, a homemaker was often more interested in learning through advertising about the newly imported calicoes than in stale news of foreign intrigue.[45]

The founding fathers, like other citizens in the eighteenth century, were not unfamiliar with, or hostile to, commercial advertising. They were materialistic people, some of whom used advertising themselves. George Washington advertised western lands in the newspaper.[46]

Because the eighteenth century was a period of aggressive, individual commercial efforts, the distinction made by the Supreme Court in 1942 between editorial content and "purely commercial" advertising may never have occurred to the founding fathers. It was difficult at that time to draw a line between the commercial and the editorial. Advertising did not have a format or position in the paper distinct from news,[47] and the paper's staff was not yet specialized. The editor was often reporter, salesman, editor and bookkeeper all at once.[48]

Further blurring the distinction between expression and commerce in the eighteenth century was the equal status of liberty and

property rights. When an eighteenth-century editor published his paper he was exercising his natural right to control property as much as his right of free expression. Much of the opposition to English taxes on the press--including taxes on advertising--was focused on infringements on property rights rather than restrictions on free expression.[49] Benjamin Franklin, a former editor and principal voice of the colonists' opposition to the Stamp Act of 1765, never mentioned freedom of the press in his examination before the British Parliament, despite the fact that several questions were prearranged with friendly Members of Parliament.[50] The colonists were concerned about taxation on their property without representation.

Civil liberties may take precedence over property rights in twentieth century law, but this was not the case in the eighteenth century.[51] Thus, even though advertising does belong to the realm of property transactions, one cannot say with surety that the founding fathers would have excluded it from first amendment protections.

The English law of caveat emptor governing advertising during that period also supports the contention that advertising might have had a place under the first amendment. Caveat emptor, or "buyer beware," operates on the same laissez-faire principle as the first amendment. The buyer of a product, like the reader of a newspaper, must decide what statements he is willing to accept. If he makes a wrong choice, he has only himself to blame. Unless an eighteenth century buyer could demonstrate the very difficult proof of fraud or breech of contract, he had to take responsibility for the condition of goods he bought, regardless

of how the seller represented them.[52]

While the guiding principle behind the first amendment is caveat emptor, it does not necessarily follow that the founding fathers would have wanted to incorporate the law of advertising into the first amendment. Caveat emptor was not law governing speech so much as it was law governing property transactions. It was a commercial concept with obscure origins in horse trading and land dealings.[53]

The role of property and commercialism in the eighteenth century as well as the law of advertising do not provide strong evidence that the founding fathers intended to exclude advertising from first amendment protections. But these are perhaps not the most relevant factors in determining the relationship of the first amendment to commercial expression. Perhaps of more importance are the political pressures which gave rise to, and shaped, the first amendment.

Like other amendments, the first amendment was enacted in response to specific abuses. Just as the third amendment was a reaction to the irritating British practice of quartering troops in private homes, and the fourth amendment was a backlash against insulting government searches, the first amendment sprang from vivid memories of government licensing, taxes, censorship and prosecutions for seditious libel.[54] Although political expediency no doubt played a significant role in the passage of the Bill of Rights,[55] to the extent the first amendment was a genuine attempt to secure freedom of expression, it was an attempt to secure freedom of political expression. There

was a consistent articulation before, during and after adoption of the first amendment of a need for free expression if government were to function effectively. Protections for commercial speech were never mentioned. It is unlikely that during a time that libertarians were still struggling to establish truth as a defense in libel suits they gave much consideration to commercial speech.[56]

Again and again the theme of free political expression has been heard. Benjamin Franklin, though hardly the most courageous or steadfast champion of a free press, interpreted liberty of the press to mean liberty to discuss ". . . the Propriety of Public Measures and political opinions."[57] Chief Justice Thomas McKean of Pennsylvania, also not an unblemished crusader for free speech, said that speech protections in the Pennsylvania constitution ". . . give to every citizen a right of investigating the conduct of those who are entrusted with the public business. . . ."[58] James Madison opposed the Sedition Act of 1798 in large measure because ". . . it is leveled against the right of freely examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right."[59] The U.S. Constitution, too, recognizes the importance of political speech by granting Senators and Representatives freedom from questioning for any speech or debate in either house.[60] Several libertarian tracts written during the later 1700s and early 1800s announce in their titles the concern of their authors with freedom of political expression.[61]

Since adoption of the Bill of Rights, the primary purpose of the first amendment has continued to be the protection of political speech. In the 19th century, James Mill said ". . . freedom of the press is of such importance, that there is no security for good government without it."[62] In 1931, when the Supreme Court ruled that first amendment press protections could be applied against the states, it noted that liberty of the press is "especially cherished" for the freedom it afforded from previous restraint of "censure of public officers and charges of official misconduct."[63] In 1976, in a case involving political campaign financing, the court reiterated that "discussion of public issues and debate on qualifications of candidates are integral to the operation of the system of government established by our Constitution."[64] Meiklejohn and Emerson, too, recognized the importance of free expression for political ends.[65]

Neither the authors of the first amendment nor later judges and philosophers have argued that every political statement, no matter how false or libelous, deserves first amendment protection.[66] But since at least the eighteenth century, the desire to guarantee freedom of speech and the press has been stated primarily as a desire to guarantee freedom of political expression. Professor Harry Kalven was correct when he concluded that the "central meaning" of the first amendment is the

protection it provides from seditious libel laws.[67]

In Virginia Citizens Mr. Justice Blackmun tried unsuccessfully to show that drug price advertisements serve the central political purposes of the first amendment. "So long as we preserve a predominantly free enterprise economy," Blackmun wrote,

> the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [citations omitted] And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.[68]

In one smooth jump, Blackmun equated the free trade of commercial products with the free trade of ideas in a democracy. If advertising serves to allocate resources in a free enterprise system, Blackmun said, then it serves as "an instrument to enlighten public decisionmaking" as Meiklejohn said protected speech should. But the Meiklejohn view, Rehnquist reminded the court in his dissent, relates to

> public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to . . . political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.[69]

Blackmun was arguably correct when he said that advertising may be indispensable to the allocation of resources in a market

economy. But even if that is true, it does not follow that advertising is "indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." One can have decided opinions on how to shape the economy without paying any attention to advertising.

The marketplace of ideas borrows metaphor from the economic marketplace, but the two are not synonymous. If individual advertisements which aid private economic decisions do not conform to the Meiklejohn view of the first amendment, the "aggregate" effect of these decisions does not either. A speech, editorial or advertisement either belongs under the first amendment umbrella or it does not. The content of the message, rather than some delayed economic impact, is what merits constitutional protection.

No one can deny that many advertisements are useful to individual consumers, but an ad is useful, as Blackmun says, in private economic decision-making, not in political and social decision-making to which first amendment speech is supposed to contribute. It is gratuitous of the court to say commercial advertising conforms to the Meiklejohn understanding of the political purposes of the first amendment when Meiklejohn explicitly excluded commercial speech from his theory of free expression.

Of course speech does not have to relate directly to narrow political issues in order to be worthy of protection. Even Meiklejohn was willing to extend first amendment status to discussion of education, philosophy and other subjects, although he insisted that this speech was valuable for its relation to governance.[70]

But others have recognized a value in discussion that did not depend on a direct link to politics. Milton saw in the free conflict of ideas the emergence of truth,[71] a value of free expression still recognized by Emerson.[72] Cato argued that where printing is halted there is ". . .neither Liberty, Property, true Religion, Arts, Sciences, Learning or Knowledge. . . ."[73] Similarly, Tunis Wortman, in his bold demand for a free press in 1800 argued that without free expression ". . . the cultivation of intellect, and the progress of literature. . ." would be stunted.[74] Guarantees of free expression also help the individual towards self-fulfillment, a necessary goal if he is to retain his natural dignity.[75]

It can be argued that some commercial advertising contributes to at least some of these social values. Certainly a successful advertising copywriter experiences self-fulfillment, and it can not be denied that advertising has contributed to music and art.[76] But these are tangential values which should not obscure the integral tie of a commercial ad to the product it tries to sell. The content of an ad which offers a product or service for sale is an agent in the stream of commerce, not a voice in the market of ideas. That there is much mental energy and many satisfactions in advertising does not mean that the advertising content should become protected expression. Tic Tac Toe may contribute to a person's mental agility, and a weekend craftsman may derive self-fulfillment from automobile restoration, but neither of their activities serves first amendment purposes. The first amendment protects the content of expression, not the motives of the

advertiser, not the self-fulfillment experienced, not the tangential benefits to science or business.[77] If the content of an ad contributes on its own to political or social issues, it merits first amendment protection, but if it serves as a surrogate for property there is no reason not to regulate the advertising just as property and trade are regulated.

Even advocates of extending constitutional protection to commercial advertising acknowledge that first amendment interests are at best very narrow. The first amendment is normally thought to protect four categories of expression--valid and erroneous ideas and true and false factual statements. Of particular political importance is the protection given to false statements. Libertarians struggled through the eighteenth century to gain protection for false statements in the political realm.[78] "[E]r-roneous statement," Mr. Justice Brennan said in the New York Times-Sullivan case, "is inevitable in free debate and. . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"[79]

But commercial advertising, at most, qualifies for protection under one category of expression. Ads which merely offer a product for sale do not qualify for protection because of the ideas or opinions they put forth, because they put forth none. The only "idea" in a drug price advertisement, Blackmun said, is, "I will sell you the X prescription drug at the Y price."[80] This is no idea at all, as the justice's quotation marks around the word "idea" indicate.

Not only is commercial advertising devoid of opinion and ideas, it also has no value when false, a fact recognized by Blackmun and other supporters of protections for commercial

speech.[81] A false political statement may merit protection because of the ambiguousness of many political truths and the dangers of government censorship, but there is less ambiguity in product advertising and no reason to object to government regulations of advertising which protect the consumer.[82]

The court's willingness to cleanse advertising of its falsehoods is justifiable from a consumer's point of view, but it creates a first amendment contradiction. The first amendment is supposed to protect rough and tumble debate on important issues, not provide a gloss of "protection" for commercial sales messages after they have been thoroughly domesticated by the government. Lacking opinion or ideas initially, and further unburdened of objectionable falsehoods, commercial product advertising is a eunuch in the marketplace of ideas. Carefully circumscribed advertising serves consumers, but the necessity of narrowing and limiting advertising means it does not serve first amendment goals.

Weakening the First Amendment

While the first amendment value of commercial advertising is at best questionable, the administrative procedures necessary to determine truth and falsity present unprecedented possibilities for government interference in protected expression. Government regulation of commercial speech could set precedents for regulation of other forms of protected expression.

The court appears to be willing to tolerate administrative regulation of advertising because of the justices' basic uncertainty over the value of commercial speech. Despite the court's strong support for constitutional protections on factual, even "tasteless and excessive" commercial advertisements,[83] the justices have not given commercial advertising an unambiguous constitutional endorsement. Blackmun kept the door open on the commercial speech doctrine when he suggested in Virginia Citizens there are "commonsense differences" between speech that proposes

a commercial transaction and other varieties of expression. These differences, he said, ". . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."[84] Without explaining the differences, Blackmun suggested that commercial advertising might not merit as strong constitutional protections as other speech.

Blackmun further undermined his commitment to constitutional protections for commercial speech when he noted that more regulations might be put on commercial advertising than on other types of speech because of the commercial motives of advertisers. Because advertisers need to advertise for their livelihood, Blackmun reasoned, regulations are not likely to intimidate them. Thus more regulations can be tolerated on commercial speech than on non-commercial.[85] On the one hand the court wants to end the second class legal status of commercial speech, but on the other it says the advertiser's profit motive places commercial speech in a lower constitutional category regardless of the content of an advertisement.[86]

The result of this ambiguity is a willingness on the part of the court to tolerate administrative regulation of commercial speech to a degree unheard of with political and social discourse. In both Virginia Citizens and Bates Blackmun was willing to permit professional associations to continue monitoring, even correcting, advertisements by its members. It may be appropriate, he said, ". . . to require that a commercial message appear in such a form, or include such additional information, warnings,

and disclaimers, as are necessary to prevent its being deceptive."[87] If constitutional status were extended to other types of commercial speech there is no indication the court would be unwilling to permit the Federal Trade Commission to determine whether ads are false, misleading or deceptive.[88]

Administrative oversight of constitutionally protected speech is not unknown in American law. The Supreme Court has held that films and plays may be reviewed for obscenity before public showing,[89] but there must be provisions for quick judicial review of the administrative decision. What is new in commercial speech is the court's willingness to permit routine review of truth and falsity and to grant authority for administrative changes in constitutionally protected expression. The court's commercial speech rulings could even lead to higher first amendment protections for speech mandated by the government than for an advertiser's commercial offering. If a druggist's price advertisement is misleading or false, it would not qualify for constitutional protection. But a "corrected" version approved by a pharmacists' professional association or the Federal Trade Commission would be protected. Protections from government infringement become meaningless when they permit government review of truth and may even permit publication by government order. And it is hard to imagine how constitutional guidelines could ever be very predictable when the authority granted by the Supreme Court to the FTC is already ". . . too vague to provide any meaningful enforcement guidelines."[90]

It is easy to exaggerate the evil precedents that could develop from extending half-hearted constitutional protections to

commercial advertising. But the danger of trivializing and debasing the first amendment is real when the court is willing to extend constitutional "protections" to speech which the court demonstrates it does not consider to be as worthy of protections as political and social expression. Never before has the first amendment been extended to a form of expression with such an ambiguous endorsement.

The court, in effect, is creating a continuum cut of the first amendment. There is important political speech at the top of the continuum which is protected with the full power of the categorical language of the first amendment: "Congress shall make no law. . ." Further down the continuum is commercial speech which, according to Mr. Justice Blackmun, "common sense" says may be subject to more stringent controls. But when speech is protected by the first amendment and still retains an inferior status, the danger arises that ". . . the doctrine which results in prior restraint of commercial speech may be applied to political, literary and social comment."[91]

Mr. Justice Stewart criticized Mr. Justice Stevens in Young v. American Mini Theatres when Stevens, writing for the court, applied a variable first amendment standard to sexual expression.[92] In a five-to-four decision the court held that the first amendment was not violated by a zoning ordinance that controlled the location of theaters showing adult movies. Stevens was not concerned about the charge the ordinance was too vague to allow courts to make predictable rulings on what films came under the law. Stevens downplayed the vagueness question, in part, because he said there ". . . is surely a less vital interest

in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in free dissemination of ideas of social and political significance. . . ."[93]

In his dissent, Mr. Justice Stewart objected that the ". . . court implies that these films are not entitled to the full protection of the Constitution."[94] First amendment protections do not vary according to the value members of the public might accord different kinds of speech, Stewart said.[95] If expression merits protection under the first amendment, it merits full protection, not an intermediate protection conditioned on popular opinion, profit motives or common sense. Stewart noted in the Pentagon Papers case that when everything is classified, nothing is.[96] Similarly, when every expression is constitutionally protected, protections for the most important speech are weakened. The flimsy protections accorded the lowest form of speech dilute protections on the highest. In the case of commercial advertising this problem can be avoided by treating advertising as part of commerce rather than part of the system of free expression.

Consumerism and the First Amendment

Professor Paul Freund once called ours an age of ". . . increasing sensitivity toward human rights. . ." and ". . . large conceptions of equality under law."[97] The attempt to extend first amendment protections to commercial advertising can perhaps be best understood as part of the movement to promote equality. As corporations gain size and power, the law must be sensitive to the needs of the individual for compensating power.[98]

It is significant that the court in its commercial speech cases seems more interested in supporting the consumer movement than in expanding free speech. Besides granting constitutional protections to the most commercial qualities of the advertisements, Justice Blackmun emphasized the economic impact of his opinion by referring not to readers or listeners but to "consumers " who would profit from drug price advertising.[99] "We deem it significant," the court said in Bates, ". . . that consumer organizations have filed briefs as amici urging that the restriction on advertising be lifted."[100]

Although consumers may benefit from having price information about drugs, lawyers' services and other commercial offerings, the first amendment is not an appropriate instrument for carrying out such an economic policy. The constitutional justification for the three commercial speech cases is that consumers have a first amendment right to receive news of abortions or the prices of drugs and lawyers' services.[101] But the right to receive is an insufficient rationale for a major new direction in constitutional law.

The right to receive has long been a corollary to first amendment protections on the right to speak and publish. The Supreme Court, striking down an ordinance limiting the distribution of religious literature, said that the first amendment ". . . embraces the right to distribute literature, and necessarily protects the right to receive it."[102] In upholding the constitutionality of the fairness doctrine, the court said, "It is the right of the viewers and listeners, not the right of broadcasters, which is paramount."[103] The court has also recognized

a first amendment right to receive foreign communist propaganda without having to request that the post office deliver it.[104] The court ruled, too, that one has a right to read pornography in the privacy of his home.[105]

The right to receive, while well-established in the law, is not complete in itself. The right to receive, like the right to self-fulfillment, is ancillary to the fundamental first amendment protection on the right to speak or publish.[106] The right of the people to know, Louis Henkin wrote, is derivative. It is ". . . the obverse of the right of the Press to publish, and coextensive with it."[107]

The right to receive implies a prior constitutional protection on the content received. If there is no first amendment interest in the content received, there is no justification for a constitutional right to receive it. In Virginia Citizens Mr. Justice Blackmun said the first amendment did not provide only a right to receive; the protection applied ". . . to the communication, to its source and to its recipients both."[108] But Blackmun never explained why pharmacists had a first amendment right to publish drug prices. The court was more interested in expanding the rights of the consumer group that brought the case to court. Even in Bates--where suit was brought by the advertiser--and in Bigelow--where suit was brought by a newspaper--the court relied on the first amendment right to receive rather than on the right to publish.

The court may yet have to deal more explicitly with the right of corporate advertisers to purchase constitutionally protected commercial speech. The court has created, at least by implication, a first amendment right for companies to advertise commercial

products--or at least prices--if the public has an interest in receiving the messages. But this creates an anomaly. Under present law, corporations and unions are not permitted to buy advertising to support political candidates.[109] But presumably corporations should have a stronger constitutional claim to buy political ads than commercial ads. Readers should have a stronger first amendment right to receive political content, too. Is the court saying that price advertising of uniform products can be of higher value than political speech?

Not only is the right to receive an insufficient justification for extending the first amendment to commercial advertising, but the court's reliance on the people's right to know increases the opportunities for government interference in protected speech. If the courts can determine what citizens have a right to receive, they can determine what citizens do not have a right to receive. It is better that individual speakers, advertisers and editors plead their own cases for freedom to speak and publish than that the courts are left to determine what the public is entitled to receive.[110] Carried to its logical limits, C. Edwin Baker observed, emphasis on the right to receive ". . . might well require governmental restructuring of the speech 'market' in order to correct 'market breakdown,' or to assure that the listener receives better or more diverse information."[111]

If the first amendment is an inappropriate tool with which to strike down restrictions on commercial advertising, there are other methods that can also serve the consumer interest. Where advertising restrictions are not carried out under authority of the state, the antitrust laws can be employed.

the Federal Trade Commission filed suit against the American Bar Association charging that association bans on lawyers' advertising are a restraint on trade.[112] The FTC also proposed a trade regulation rule to permit advertising of eye glasses by optometrists.[113] Trade regulation rules, based on the commission's authority to regulate fairness in commerce, could be used to free other restrictions as well. Some state courts avoided a first amendment question by simply ruling that prohibitions on price advertising bear no reasonable relation to the state's goal of regulating health, and therefore are invalid.[114] One court ruled that a board overstepped its powers when it prohibited advertising of discounts of prescription drugs.[115] No first amendment question was presented.

If a court wanted to deal with advertising as a constitutional question but wanted to avoid the pitfalls of a first amendment analysis, it could rule that bans on advertising deprive a person of "liberty" or "property" in violation of the fifth and fourteenth amendments. Meiklejohn suggested that the fifth amendment protected a liberty of expression that could be regulated by the government without violation of the fundamental protections on free speech in the first amendment. To Meiklejohn the liberty of expression protected in the fifth amendment was a personal right to promote oneself without the social benefits ancillary to first amendment safeguards.[116]

Conclusion

There is something appealingly democratic about granting first amendment protections to commercial advertising. If the

purpose of the first amendment is to protect the freedoms of democratic government, why not be completely democratic about the type of expression protected? Where the first amendment is written in categorical language, there is an attractive consistency in extending its protections to all types of expression. But, as Walter Gellhorn observed, the result of attempting to benefit the consumer through the first amendment is to overwork the first amendment.[117]

The court's present course of expanding first amendment protections to commercial price advertising may serve desirable social ends, but not without dangers to the first amendment. Advertising which offers a commodity for sale does not belong to the realm of speech as much as it belongs to the realm of trade and commerce. As part of commerce it's content does not serve first amendment ends. Not only is it inappropriate to use the first amendment to protect commercial advertising, but the regulatory mechanisms the court is willing to tolerate pose serious dangers to the integrity of the first amendment. If it is desirable social policy to expand information available to consumers, there are other legal tools that are more appropriate than the first amendment.

Footnotes

[1]Philip B. Kurland, ed., Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution, (Cambridge, Mass.: Belknap Press, 1970), p. 177.

[2]Bigelow v. Virginia, 421 U.S. 809 (1975), hereinafter cited as Bigelow. Va. Code Ann. §18.1-63 (1960) under which Bigelow was prosecuted read:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.

The law was amended in 1972 to make it illegal to advertise an abortion only if it would be performed in the state of Virginia in violation of Virginia law. The abortion service advertised in the Bigelow case was in New York. Ibid., pp. 812-13.

[3]425 U.S. 748 (1976), hereinafter cited as Virginia Citizens. §54-524.35 of Va. Code Ann. (1974) provided that a pharmacist licensed in Virginia was guilty of unprofessional conduct if he "(3) publishes, advertises or promotes . . . any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

[4]45 U.S.L.W. 4895 (1977), hereinafter cited as Bates. Disciplinary Rule 2-101 (B), embodied in Rule 29(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. (1976 Supp.) provided in part:

> "(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements. . . or other means of commercial publicity. . . .

Mr. Justice Rehnquist, who dissented alone in Virginia Citizens, was joined in dissent in Bigelow by Mr. Justice White. Rehnquist also dissented on the first amendment question in Bates, as did Mr. Chief Justice Burger, Mr. Justice Powell and Mr. Justice Stewart.

[5]The commercial speech doctrine originated in 1942 in Valentine v. Chrestensen, 316 U.S. 52 (1942), in which a unanimous court held that "purely commercial advertising" is not protected by the first amendment. Ibid., p. 54. Since 1942 the court has held that expression might have a commercial element and still be protected. See, e.g., Jamison v. Texas, 318 U.S. 413 (1943) (sale of religious literature). In 1964 the court ruled that political expression did not lose first amendment status because it appeared in a paid newspaper advertisement. New York Times v. Sullivan, 376 U.S. 254 (1964). In 1973 the court suggested that true commercial advertisements for legal products might be entitled to constitutional protections. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (want ad not protected where it aided discrimination in hiring by sex.)

[6]425 U.S. 748, 759 (1976).

[7]Ibid. Italics in original.

[8]Ibid., p. 781 (dissenting opinion).

[9]425 U.S. 748,770 (1976); 45 U.S.L.W. 4895, 4899-4900 (1977).

[10]425 U.S. 748, 762 (1976). Advertising is the sine qua non of commercial profits, Blackmun said. p. 772, note 24.

[11]Ibid., p. 752; 45 U.S.L.W. 4895, 4901 (1977). In his concurring opinion in Virginia Citizens, Mr. Chief Justice Burger said that a pharmacist selling pre-packaged prescription drugs ". . . performs largely a packaging rather than a compounding

function of former times." 425 U.S. 748, 774 (1976). The Treasury Department considered the dispensing of prescription drugs to be a retail activity for purposes of price posting under the Economic Stabilization Act. See, Stipulation of Facts, in Appendix, Brief of Appellees, Virginia Citizens, p. 13. Ninety-five percent of all prescriptions are filled with dosage forms prepared by the pharmaceutical manufacturer. 425 U.S. 748, 752 (1976).

[12]"The Right to Know: First Amendment Overbreadth?" Washington University Law Quarterly, 1976, p. 28.

[13]This paper is limited to a discussion of ads which do no more than offer a commercial product or service for sale. Ads that make political statements (See New York Times v. Sullivan, note 5 supra.) certainly merit first amendment protections. Some ads will have mixed content, making it difficult to determine if the whole ad should be protected. As in other areas of first amendment adjudication, the presumption should be in favor of constitutionality. In the case of an ad with mixed content, a court might rule the whole ad protected if the unprotected material was rationally related to that which is protected. See, Comment, "First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine," University of Chicago Law Review, 44 (Fall, 1976), p. 232. An ad which offers a prescription drug, legal services for a house closing or a vacuum cleaner at a set price presents no need for a court to distinguish between editorial and commercial content. Such an ad is purely commercial. An ad for a commercial abortion referral service would not merit protection as a simple commercial offering, but might merit protection as a necessary adjunct to the full exercise of the constitutionally protected right of a woman to have an abortion.

Roe v. Wade, 410 U.S. 113 (1973); see, C. Edwin Baker, "Commercial Speech: A Problem in the Theory of Freedom," Iowa Law Review, 62 (October 1976), p. 49, hereinafter cited as Baker, "Problem in Theory of Freedom." Baker argues that while commercial speech generally does not merit first amendment protections, ads run by a newspaper might be protected because of the special constitutional status of a newspaper. The same argument could apply where abortion is the issue.

[14]See, Martin H. Redish, "The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression," George Washington Law Review, 39 (March 1971), pp. 429-73; R.H. Coase, "Advertising and Free Speech," paper delivered at the "Conference on Advertising vs. Free Speech: Dilemma or Invention," University of Miami School of Law, Coral Gables, Fla., April 23, 1976; Coase, "The Market for Goods and the Market for Ideas," American Economic Review, Papers and Proceedings, 64 (May, 1974), pt. 2; Vern Countryman, "Advertising Is Speech," paper delivered at"Conference on Advertising vs. Free Speech;" Monroe H. Freedman, "Commercial Speech and the First Amendment: A Response to Professor Coase," paper delivered at "Conference on Advertising vs. Free Speech;" Note, "Commercial Speech--An End in Sight to Chrestensen?" Depaul Law Review, 23 (Spring 1974), pp. 1258-75; Ronald D. Rotunda, "The Commercial Speech Doctrine in the Supreme Court," University of Illinois Law Forum, 1976, pp. 1080-1101.

[15]Toward A General Theory of the First Amendment (New York: Vintage Books, 1963), p. 105, note 46.

[16]Political Freedom: The Constitutional Powers of the People (New York: Oxford University Press, 1965), p. 37.

[17]Meiklejohn thought the first amendment protects speech "by which we 'govern.'" "The First Amendment Is an Absolute," Supreme Court Review (1961), p. 256. Included within Meiklejohn's protected category is discussion about education, philosophy, literature and public issues which Meiklejohn thought essential to the voter. Ibid., p. 257. Alexander Bickel also argued that first amendment protections were primarily for political expression. See, The Morality of Consent (New Haven: Yale University Press, 1975), p. 62. Walter Berns would narrow protections even further, to speech supporting a republican form of government. See, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976). See also, Baker, "Problem in Theory of Freedom," note 13 supra.

[18]James W. Carey, "Advertising: An Institutional Approach," in C. H. Sandage and Vernon Fryburger, eds., The Role of Advertising: A Book of Readings (Homewood, Ill.: Richard D. Irwin, 1960), pp. 13-16.

[19]George Eric Rosden and Peter Eric Rosden, The Law of Advertising, I (New York: Matthew Bender, 1976), p. 4--10.

[20]"State court, federal agency say shoppers are not newspapers," Editor and Publisher, 110 (July 16, 1977), p. 15.

[21]Serve Yourself Gasoline Stations Ass'n, Inc. v. Brock, 39 Cal.2d 813, 249 P.2d 545 (1952), appeal denied 345 U.S. 980 (1952); Levy v. Pontiac, 331 Mich. 100, 49 N.W.2d 80 (1957); Merit Oil Co. v. Director, 319 Mass. 301, 65 N.E.2d 529 (1946).

[22]FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).

[23]Section 5, Pub. L. No. 203, 63rd Cong. 2d sess., 38 Stat. 717, 15 U.S.C. §§ 45 (1914). The courts retained power to determine ultimately what is an "unfair" method of competition. FTC v. Gratz, 253 U.S. 421,427 (1920).

[24]See, "Developments in the Law: Deceptive Advertising," Harvard Law Review 80 (March 1967), pp. 1010-13.

[25]See, for example, Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (trust violation not found).

[26]Gay Talese, The Kingdom and the Power (New York: The World Publishing Co., 1966), pp. 74-78.

[27]Kordel v. United States, 335 U.S. 345 (1948); a Washington state law, struck down on first amendment grounds, lumped certain kinds of labeling, selling and advertising as prohibited activities. Anderson, Clayton & Co. v. Washington State Department of Agriculture, 402 F. Supp. 1253 (W.D. Wash. 1975).

[28]Virginia Citizens, 425 U.S. 748, 761 (1976); Bates, 45 U.S.L.W. 4895, 4899 (1977).

[29]See, New York Times v. Sullivan, 376 U.S. 254 (1964) (libel); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974)(privacy); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (spoken fighting words); Feiner v. New York, 340 U.S. 315 (1951) (spoken words threatening public peace); Dennis v. United States, 341 U.S. 494 (1951) (advocacy of overthrow of the government); Miller v. California, 413 U.S. 15 (1973) (obscenity).

[30]"Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way." 425 U.S. 748, 772 (1976); see also, Bates, 45 U.S. L.W. 4895, 4904 (1977).

[31]In Pittsburgh Press, note 5 supra, the court denied constitutional protections where a want-ad aided illegal discrimination in hiring. In Bigelow the abortion clinic was legal in New York at the time the ad ran in the paper but later was declared illegal. 421 U.S. 809, 822-23, note 8. The court refused to say how it might rule if the ad were for a commercial abortion service illegal by statute in Virginia. Ibid., pp. 823-24, note 9.

[32]This intolerance for false content creates constitutional problems of its own. See infra notes 81-90 and accompanying text.

[33]It might be argued that political speech urging violence loses protection not because of its content but because of later physical damage. This is partially true, but the content itself must become an illegal act of incitement to lose protections. See, Brandenburg v. Ohio, 395 U.S. 444 (1969).

[34]New York Times Co. v. United States, 403 U.S. 713, 751 (1971) (dissenting opinion).

[35]People v. Kunkin, 24 Cal. App.3rd 447, 100 Cal. Rptr. 845 (1972), rev'd on other grounds, 9 Cal3rd 245, 107 Cal. Rptr. 184, 507 P.2d 1392 (1973). See, Everette E. Dennis, "Leaked Information as Property: Vulnerability of the Press to Criminal Prosecution," Saint Louis University Law Journal, 20 (Summer 1976), pp. 618-20.

[36]See Mr. Justice Brennan's concurring opinion, p. 727; the concurring opinion of Mr. Justice Stewart, joined by Mr. Justice White, p. 730, and White's opinion joined by Stewart, p. 732.

[37]In Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), cert. denied 395 U.S. 947 (1969), the federal appeals court said that publication of documents was not punishable where intrusion into the office to steal documents might be.

[38]"In the world of here and now," Walton Hamilton observed, "justification-by-origin has gone the way of all doctrine." "Property--According to Locke," Yale Law Journal, 39 (April 1932), p, 878.

[39]Chrestensen v. Valentine, 122 F.2d 511, 524 (1941) (dissenting opinion).

[40]See, Max Farrand, ed., The Records of the Federal Convention of 1787 (New Haven: Yale University Press, 1911); Johathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Philadelphia: J.B. Lippincott, 1866); The Debates and Proceedings in the Congress of the United States, (Annals of Congress), vol. I (Washington: Gales and Seaton, 1834); Leonard Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression (New York: Harper Torchbook, 1960), hereinafter cited as Levy, Legacy of Suppression.

[41]Ibid.

[42]"Letter XVI, January 20, 1788," in An Additional Number of Letters from the Federal Farmer to the Republican (Chicago: Quadrangle Books, 1962), pp. 151-53, reprinted from the original edition (New York: 1788), in Leonard Levy, ed., Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories, (Indianapolis: The Bobbs-Merrill Co., 1966), p. 144 (emphasis added).

[43]Cato's Letters: Or, Essays on Liberty, Civil and Religious, No. 15, as reprinted in the New-York Weekly Journal, Feb. 18, 1734, in Levy, Ibid., p. 11.

[44]For evidence of the extensive role of commercialism and advertising in the eighteenth century, see, James Melvin Lee, History of American Journalism (Garden City, N.Y.: The Garden City Publishing Co., 1917), p. 94; Clyde A. Duniway, The Development of Freedom of the Press in Massachusetts (New York: Longman, Green, and Co., 1906), p. 91; Maurice R. Cullen, Jr., "The Boston Gazette: A Community Newspaper," Journalism Quarterly, 36 (Spring 1959), pp. 204-08; E. Wilder Spaulding, "The Connecticut Courant, A Representative Newspaper in the Eighteenth Century," The New England Quarterly, 3 (July 1930), p. 447.

[45]Mr. Justice Blackmun notes in Virginia Citizens the high interest of readers in commercial advertising 200 years later. 425 U.S. 748, 763 (1976).

[46]James Playsted Wood, The Story of Advertising (New York: The Ronald Press, 1958), pp. 66-69; In the 1770s George Washington was calling himself a "merchant" rather than a "planter." Louis M. Hacker, The Triumph of American Capitalism (New York: Columbia University Press, 1946), p. 139; for a fuller discussion of the role of advertising in the eighteenth century press, see, Kent R. Middleton, "Commercial Speech in the Eighteenth Century," in Newsletters to Newspapers: Eighteenth-Century Journalism, edited by Donovan H. Bond and W. Reynolds McLeod, School of Journalism, West Virginia University, in press.

[47]See, Lawrence C. Wroth, The Colonial Printer (Portland, Maine: The Southworth-Anthoensen Press, 1938), p. 234: J. Leander Bishop, A History of American Manufactures from 1608 to 1860, 3rd ed., vol. 1 (Philadelphia: Edward Young and Co., 1868), p. 188.

[48]Peter J. Parker, "The Philadelphia Printer: A Study

of an Eighteenth-Century Businessman," Business History Review, 40 (Spring, 1966), pp. 29-34.

[49]Chester James Antieau, "Natural Rights and the Founding Fathers--The Virginians," Washington and Lee Law Review, 17 (1960), p. 67.

[50]"The Examination of Dr. Benjamin Franklin, in the British House of Commons, Relative to the Repeal of the American Stamp Act, in 1766," in Jared Sparks, ed., Works of Benjamin Franklin, vol. 4 (Boston: Hilliard, Gray, and Co., 1840), p. 199. Charles A. Miller concludes: "In short, there is no substantial evidence that opposition to the Stamp Act was related to freedom of expression. . . ," The Supreme Court and the Uses of History (Cambridge, Mass.: Belknap Press, 1969), p. 77.

[51]For an outline of the development of free expression as a "preferred" position under the constitution, see Henry J. Abraham, Freedom and the Court, 2d ed., (New York: Oxford University Press, 1972), pp. 8-28.

[52]Ivan L. Preston, The Great American Blow-Up (Madison: University of Wisconsin Press, 1975), p. 53; James Kent, Commentaries on American Law, 2d ed., vol. 2 (New York: O. Halsted, 1832), pp. 478-91.

[53]Walton H. Hamilton, "The ancient maxim caveat emptor," Yale Law Journal, 40 (June 1931), pp. 1164-65.

[54]Edward G. Hudon, Freedom of Speech and Press in America (Washington, D.C.: Public Affairs Press, 1963), pp. 1-6. It was widely known that fifty had been convicted of seditious libel under English law between 1760 and the passage of the American Constitution, p. 2. In Respublica v. Oswald, Pennsylvania Chief Justice McKean said that the constitutional rights to free

expression ". . . effectively preclude any attempt to fetter the press by the institution of a licenser." (emphasis in original) 1 Dallas 319, 325 (1788); Richard Henry Lee, in his appeal for specific guarantees for a free press, warned how the power to tax the press--including taxes on advertising--is the power to destroy. In Levy, Freedom of the Press from Zenger to Jefferson, note 42 supra, pp. 143-44.

[55]See, Levy, Legacy of Suppression, supra note 40, pp. ix-xxvi. Levy believes that federalism played a larger role in passage of the first amendment than any libertarian commitment to free expression.

[56]Truth was not a defense in libel until the Alien and Sedition Acts of 1798.

[57]Benjamin Franklin, "An Account of the Supremest Court of Judicature of Pennsylvania, Viz. the Court of the Press," The Federal Gazette (Philadelphia), Sept. 12, 1789, in The Writings of Benjamin Franklin, v. 10, edited by Albert Henry Smyth (New York: The Macmillan Co., 1905-07), p. 38.

[58]Respublica v. Oswald, 1 Dallas 319, 325 (1788).

[59]The Virginia Report of 1799-1800, Touching the Alien and Sedition Laws: Together with the Virginia Resolutions of December 21, 1789, the Debate and Proceedings Thereon in the House of Delegates of Virginia, and Several Other Documents (Richmond, Va.: J. W. Randolph, 1850), reprinted in Levy, Freedom of the Press from Zenger to Jefferson, note 42 supra, p. 198.

[60]Article I, section 6.

[61]William Bollan, The Freedom of Speech and Writing Upon Public Affairs Considered (London: S. Baker, 1766), reprinted in the Da Capo Press Reprint Series, Civil Liberties in American History, edited by Leonard W. Levy (New York: Da Capo Press, 1970); George Hay, Two Essays on the Liberty of the Press, one printed in 1799 and reprinted in 1803 in Richmond by Samuel Pleasants, Jr., and the other printed by Pleasants in 1803, both reprinted by Da Capo in 1970; John Thomson, An Enquiry Concerning the Liberty and Licentiousness of the Press (New York: Johnson & Stryker, 1801), reprinted by Da Capo, 1970; Tunis Wortman, A Treatise Concerning Political Enquiry and the Liberty of the Press (New York: George Forman, 1800), reprinted by Da Capo, 1970.

[62]"Liberty of the Press," in Essays on Government, Jurisprudence, Liberty of the Press and Law of Nations (1825), (New York: Augustus M. Kelley, 1967), pp. 29-30.

[63]Near v. Minnesota, 283 U.S. 697, 717 (1931); see also, New York Times v. Sullivan, 376 U.S. 254, 269 (1964).

[64]Buckley v. Valeo, 424 U.S. 1,14(1976). In Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), the court said: ". . . it can hardly be doubted that the constitutional guarantee (of free speech) has its fullest and most urgent application precisely to the conduct of campaigns for political office."

[65]Thomas I. Emerson, The System of Freedom of Expression, (New York: Vintage Books, 1970), pp. 6-7; Meiklejohn, Political Freedom, note 16 supra; "The First Amendment is an Absolute," note 17 supra.

[66]For a convincing argument that the first amendment may not have even been intended to end the law of seditious libel, see Levy, Legacy of Suppression, note 40 supra; Libel of a public official with "malice" is not protected, New York Times v. Sullivan, 376 U.S. 254 (1964); Zechariah Chafee, Jr., argued that speech could be curbed where it created a clear and present danger of harm, Free Speech in the United States (New York: Atheneum, 1969).

[67]"The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'" Supreme Court Review (1964) pp, 208-09.

[68]425 U.S. 748, 765 (1976).

[69]Ibid., p. 787 (dissenting opinion).

[70]See note 17 supra.

[71]John Milton, Areopagitica, in The Prose Works of John Milton (London: George Bell & Sons, 1883), p. 96.

[72]System of Freedom of Expression, note 65 supra, pp 6-7.

[73]Cato's Letters, No. 100, as reprinted Dec. 9, 1734, in Levy, Freedom of the Press from Zenger to Jefferson, note 42 supra, p. 21.

[74]A Treatise Concerning . . . Liberty of the Press, note 61 supra, p. 45.

[75]Emerson, System of Freedom of Expression, note 65 supra, pp. 6-7.

[76]One thinks immediately of Op and Pop art of the 1960s. A jingle such as "Coke is the Real Thing" is no doubt more appreciated by millions than the music of Mozart or Cole Porter.

[77]See the discussion of the right to receive, infra notes 101-11 and accompanying text.

[78]George Hay, Two Essays on the Liberty of the Press, note 61 supra, pp.26-27:

> If, then,the freedom of the press can be restrained to the publication of facts that are true, it follows inevitably, that it may also be restrained to the publication of opinions which are correct. There is truth in opinion, as well as in fact. Error in opinion may do as much harm, as falsity in fact: it may be as morally wrong,and it may be propagated from motives as malicious. It may do more harm, because the refutation of an opinion which is erroneous, is more difficult than the contradiction of a fact which is false. But the power of controuling opinions has never yet been claimed; yet it is manifest that the same construction, which warrants a controul in matters of fact, does the same as to matters of opinion. In addition to this, it ought to be remarked, that the difficulty of distinguishing in many cases between fact and opinion, is extremely great. . . .

[79]376 U.S. 254, 271-72 (1964). In Cantwell v. Connecticut the Supreme Court noted that in public debate on both religion and politics ". . . the pleader. . . at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement." 310 U.S. 296, 310 (1940).

[80]Virginia Citizens, 425 U.S. 748, 761 (1976).

[81]Virginia Citizens, 425 U.S. 748, 771 (1976); Bates, 45 U.S.L.W. 4895, 4904; Mr. Justice Stewart in his concurrence in Virginia Citizens said that there is little need to sanction falsehood in commercial advertising. p. 777. See Countryman, "Advertising Is Speech," note 14 supra, p. 23: "We may. . . permit the government to investigate and to pronounce on the truth of the commercial advertiser's claim, although we will not permit it to pronounce on the truth of ideas proclaimed by means of political, religious, or cultural speech." But, Redish, "The First Amendment in the Marketplace," supra note 14, p. 470, would

not permit the government to determine what is "false," whether in commercial speech or non-commercial speech.

[82]Blackmun said that commercial advertising might be more easily "verifiable" than political or social expression. Virginia Citizens, 425 U.S. 748, 772, note 24 (1976). See, Bates, 45 U.S.L.W. 4895, 4904 (1977).

[83]Virginia Citizens, Ibid., p. 765.

[84]Ibid., note 24.

[85]Ibid.; Bates, 45 U.S.L.W. 4895, 4904 (1977).

[86]One of the salutary advances of the commercial speech doctrine was its movement away from a test of the advertiser's motives to an objective evaluation of the content of the ad. In Valentine v. Chrestensen the court was influenced by the commercial intent behind Chrestensen's submarine advertisement. 316 U.S. 52, 55 (1942) But by the time of New York Times v. Sullivan, the court said the commercial motives of a newspaper were irrelevant to the constitutional protections on a political advertisement. 376 U.S. 254, 266 (1964). Blackmun's willingness to look to motive undermines his stated desire to employ a content test. See supra notes 10 and 28 and accompanying text.

[87]Virginia Citizens, 425 U.S. 748, note 24 (1976); Bates, 45 U.S.L.W. 4895, 4904 (1977).

[88]

> It is unlikely that either Bigelow or Virginia State Board will appreciably circumscribe FTC regulation of advertising.
>
> . . .
>
> The Supreme Court's reasoning in the two cases would equally support restrictions on commercial speech where the information being introduced into the marketplace is false, deceptive or unfair, and would support required disclosure of product information necessary for informed choices by buyers where the market fails to provide that information.

Robert Pitofsky, "Beyond Nader: Consumer Protection and the Regulation of Advertising," Harvard Law Review, 90 (February 1977), p. 672.

[89]Freedman v. Maryland, 380 U.S. 51 (1965) (film); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (musical).

[90]See Pitofsky, "Beyond Nader," note 88 supra, p. 681. The Council of Better Business Bureaus reviewed challenges to the accuracy of ads for "ploppier" tomato juice and a product called "Mudd" that helps clean out the "oil and gunk that cause pimples." Could these issues become constitutional questions? "Changes are due at Wells, Rich," New York Times, July 15, 1976, p. 59.

[91]"Summary of Linda Champlin Memorandum on Commercial Speech Policy," Appendix B of Memorandum of the Communications Media and Free Speech Association Committees of the American Civil Liberties Union regarding Commercial Speech and the First Amendment, Nov. 24, 1975, p. 6. The ACLU in December, 1975, adopted a policy supporting first amendment protections for corporate advertising that contributes to policy questions, but the ACLU would permit regulation of advertising where the transaction advertised can be validly regulated. Summary sent to the author by Joel M. Gora, National Staff Counsel, ACLU.

[92]427 U.S. 50 (1976).

[93]Ibid., p. 61.

[94]Ibid.,,p. 86 (dissenting opinion).

[95]Ibid.

[96]New York Times v. United States, 403 U.S. 713,729 (1971).

[97]Israel Shenker, "Freund Urges Congress to Define Bill of Rights," New York Times, (Nov. 26, 1971), p. 23. For a brilliant

attempt to reconcile the predominant American value of liberty with an understanding of the need for more equality, see, John Rawls, A Theory of Justice (Cambridge, Mass.: Belknap Press, 1971).

[98]For a discussion of the rising concern with equality, see Abraham, Freedom and the Court, supra note 51, pp. 288-367; For an example of the concern for equality in the courts see, Baker v. Carr, 369 U.S. 186 (1962) (voting rights).

[99]425 U.S. 748, 763 (1976).

[100]45 U.S.L.W. 4895, 4902, note 35 (1977).

[101]Bigelow, 421 U.S. 809, 826 (1975); Virginia Citizens, 425 U.S. 748,757 (1976); Bates, Ibid., p. 4899.

[102]Martin v. Struthers, 319 U.S. 141, 143 (1943); James Madison noted, "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or, perhaps, both." Letter from Madison to W.T. Barry, Aug. 4, 1822, cited in Comments, "The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations," Georgetown Law Journal, 63 (February 1975), p. 777.

[103]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[104]Lamont v. Postmaster General, 381 U.S. 301(1965).

[105]Stanley v. Georgia, 394 U.S. 557 (1969).

[106]See Gellhorn, "The Right to Know," supra note 12, p. 27.

[107]"The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers," University of Pennsylvania Law Review, 120 (December 1971), p. 273.

[108]425 U.S. 748, 756 (1976).

[109]See,United States v. United Auto Workers, 352 U.S.

567 (1957); United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948); Labor Management Relations Act, Act of June 23, 1947, ch. 120, §304, 61 Stat. 159 (1947).

[110]James C. Goodale, "Legal Pitfalls in the Right to Know," Washington University Law Quarterly, 1976, pp. 32-34.

[111]Baker, "Problem in Theory of Freedom," supra note 13 , p. 32.

[112]U.S. v. American Bar Association, No. 76-1182 (D.C.D.C., filed June 6, 1976). The Supreme Court ruled that the Sherman Antitrust Act would not apply in the Bates case because the restrictions on legal advertising were carried out under direction of the state. 45 U.S.L.W. 4895, 4897-98 (1977).

[113]"Proposed Rule Pertaining to Advertising of Opthalmic Goods and Services," 16 CFR 456, 41 Fed. Reg. 2399, Jan. 16, 1976.

[114]Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971); Stadnik v. Shell's City, Inc., 140 So. 2d (Fla., 1962); Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973).

[115]Mississippi State Bd. of Pharmacy v. Steale, 317 So.2d 33 (Miss. 1975).

[116]Political Freedom, note 16 supra, pp. 34-38. For a similar suggestion, see, William H. Hastie, "Free Speech: Contrasting Constitutional Concepts and Their Consequences," Harvard Civil Rights-Civil Liberties Law Review, 9 (May 1974), pp. 438-48. By removing commercial speech from first amendment consideration one reduces the danger of creating a variable first amendment that protects some speech more than others.

[117]"The Right to Know," supra note 12 and accompanying text.